No. 09-1476

Supreme Court, U.S.
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In The

Supreme Court of the United States

BOROUGH OF DURYEA, PENNSYLVANIA, *et al.*,

Petitioners,

v.

CHARLES J. GUARNIERI,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

AMICUS CURIAE BRIEF OF THE PENNSYLVANIA STATE ASSOCIATION OF BOROUGHS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Third Circuit erred in holding that state and local government employees may sue their employers for retaliation under the First Amendment's Petition Clause when they petitioned the government on matters of purely private concern, contrary to decisions by all ten other federal circuits and four state supreme courts that have ruled on the issue.

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INTEREST OF *AMICUS CURIAE*[1]

The Pennsylvania State Association of Boroughs is a non-profit incorporated association advocating the interests of more than 950 rural and urban boroughs and approximately 16,000 elected and appointed borough officials. The Association represents the boroughs at both the state and federal levels to present a unified voice on public matters of concern. The Association provides research, education and service programs to assist borough officials in fulfilling their elected duties and responsibilities. The Association is specifically charged by The Borough Code, 53 P.S. §45701, with the purpose and responsibility of advancing the interests of boroughs and improving local government.

According to the Pennsylvania Department of Community and Economic Development, boroughs are one of the most common forms of local governments in Pennsylvania. Pennsylvania boroughs have a total population of approximately 2,570,885 individuals and an average population of 2,684 per borough. The 958 boroughs of the Commonwealth represent

[1] Notice of intention to file this *amicus* brief has been provided to, received and accepted by the parties and they have consented to its filing. Consents are being submitted with this brief. Pursuant to S.Ct. R. 36.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

approximately thirty-seven percent (37%) of all municipal governments in Pennsylvania averaging approximately fourteen (14) per county. Pennsylvania is divided into a total of sixty-seven (67) counties with each borough independently governed apart from the counties.

The size of Pennsylvania boroughs varies greatly throughout the Commonwealth. Some of the largest boroughs by population (per 2000 Census) are State College (38,420 – Centre County), Bethel Park (33,556 – Allegheny County), Norristown (31,282 – Montgomery County), Monroeville (29,349 – Allegheny County), Plum (26,940 – Allegheny County), West Mifflin (22,464 – Allegheny County) and Pottstown (21,859 – Montgomery County). Some of the smallest boroughs by population in the Commonwealth are New Morgan (35 – Berks County), Valley-High (20 – Fulton County), Green Hills (18 – Washington County), Smicksburg (49 – Indiana County), Callimont (51 – Somerset County) and Glasgow (63 – Beaver County).

Boroughs are and have been a viable and vibrant form of self-government which is a part of the diverse history of the Commonwealth of Pennsylvania. The Association has an interest in this case as its adjudication shall have a substantial direct statewide impact upon a fundamental system of governing within the Commonwealth, the growth and development of boroughs in the Commonwealth and their continuing financial viability as an employer of a

work force to provide services to borough residents and taxpayers.

STATEMENT

Amicus incorporates by reference the Statement of the case set forth in the Petition For Writ of Certiorari of Petitioners Borough of Duryea, Pennsylvania, *et al.*

SUMMARY OF ARGUMENT

The Third Circuit has repeatedly rendered affirmed a right for a government employee to sue their employers for retaliation under the Petition Clause of the First Amendment, U.S. Const. Amend. I, cl. 6 on matters of solely private concern. The Third Circuit's position is at odds with the decisions of this Court and the ten other federal circuits that have consistently held that such individual public employee claims are not cognizable under the Petition Clause.

A divergence occurred in the use of petition during its history between medieval England and the English colonies upon the formation of a new nation in America. The historical origin of petition in England encompassed its use for both public and private grievances. Colonial Americans expressed their collective grievances in order to gain independence. The

concept of one voice of the populace prevailed in the use of petition which was intentionally given a comparable status to rights of speech, religion, press and assembly, to be protected in the First Amendment to preserve that independence.

The petition was a consistent tool of public dialog and means for citizens to continue to focus the attention of the new and developing government on policies and issues of public concern. The First Amendment protects the right of the People, for and by whom the Constitution was founded, to petition their Government for the redress of their grievances.

The Third Circuit acknowledges the fundamental importance of effective and efficient government. Its decision in this case belies that principle. Despite its history, the Third Circuit elevated the Petition Clause, despite its history, to provide constitutional protection to public employees who articulate individual claims, objections or grievances in writing, where such constitutional protection is not available to private sector employees.

Boroughs are a form of local government in the Commonwealth of Pennsylvania that must compete in and with private sector employers to provide wages and benefits to employees to provide services to residents and taxpayers. Boroughs and other municipalities are at a distinct disadvantage because of the Third Circuit's decision in this case, and are subject to defending a myriad of individual employee claims in the federal courts that private employers will not

need to defend. As a result of constitutionalizing public employer-employee disputes, small borough governments, which have limited revenue resources and budgets, will be easily overburdened merely by the threat of employee litigation.

The result to borough's and local government is a real threat to maintaining effective and efficient management of government operations. The dedication of volunteer public elected service will evaporate as more elected officials are besieged with individual labor issues because of the elevated protection afforded by the Petition Clause.

The right of Petition was never intended to be given any "special first amendment status." *McDonald v. Smith*, 472 U.S. 479, 482, 485 (1985). Using the Petition Clause to prosecute private individual disputes will engender greater divisiveness than employee speech itself. It is time for the principle that all citizens' fundamental rights are protected expressed in *Connick v. Myers*, 461 U.S. 138 (1983) be implemented by holding public employees to the same standard of public concern as private sector employees in the Third Circuit.

ARGUMENT

The Third Circuit stands alone holding that "a public employee who has petitioned the government through a formal mechanism such as the filing of a lawsuit or grievance is protected under the Petition

Clause from retaliation for that activity, *even if the petition concerns a matter of solely private concern.*" *Guarnieri v. Durvea Borough*, Slip Copy, 2010 WL 381398, *2 (C.A. 3, Feb. 4, 2010) (emphasis added). This holding is at odds with the underlying principle that all citizens' fundamental rights are protected. This principle is clearly expressed in *Connick v. Myers*, where this Court stated, "Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; *this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the state.*" 461 U.S. 138, 147, 103 S.Ct. 1684, 1690 (1983) (emphasis added).

The Third Circuit has elevated the Petition Clause, giving it greater deference and greater protection than the other rights protected by the First Amendment. The Third Circuit attempted to justify its position by tracing the historical roots of the Petition Clause to the Magna Carta in 1215. The right that was granted under the Magna Carta, and the right that developed in medieval England saw the petition used to redress both public and private ills. As medieval society evolved into modern society, and as the English colonies became the United States of America, the rights of the people (and the rights protected by the Petition Clause) have also evolved, taking a different path than was followed in England.

The use of the petition to redress individual, private grievances never gained a strong foothold in

America. The Third Circuit lost sight of this critical divergence. Prior to gaining our independence from England, the petition was the only safe means by which the Colonists could complain about and criticize the policies and practices of the King.[1] Petitioning was also one of the principle means for Colonists to formalize popular positions that eventually became law. The right to petition was used by the Colonists to present grievances to the King; for the Colonial Americans the right to petition was the means by which citizens expressed grievances or championed change to government. While the protections and rights offered by the Petition Clause have survived through the First Amendment, these protections and rights have also necessarily evolved. One American concept has remained true – the petition has principally been the one voice upon which the *populace* has relied to express itself to the governing entity.

At the time of the Revolution political petitions were the only authorized way for individuals to voice complaints and concerns to the government. The Founding Fathers recognized the need to preserve petition rights after the Revolution. They did so, however, not by elevating the petition above or separating it from the other First Amendment rights, but by including the right to petition government

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[1] The Stamp Act and the Molasses Act are two of the laws against which pre-Revolution Colonial *Assemblies* petitioned.

together with the rights of speech, religion, press and assembly. Importantly, the rights of Petition and Assembly were initially considered as their own amendment, separate from religion, speech and press. This initial concept was discarded in the final version of the Bill of Rights; freedoms of speech, religion, press, assembly and petition were combined in the First Amendment with no pretext of superiority of any one right over another.[5]

The First Amendment was borne out of a time in history when oppressive restrictions on seditious speech existed to quash public expression by critics of the Crown. Consolidating the protection of speech on matters of public concern with the right to petition is telling and persuasive of the parity that needs to be achieved today by reversing the position taken by the Third Circuit.

Historically, the petition right in early America was used by groups and individuals to address subject matters that were both political and purely private in nature. As our country grew and matured, and as our single government evolved into many local forms of government, the petition continued to evolve. The petition was once a form of public dialog before

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[5] For a detailed history of the Petition Clause see: Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 Hastings Const. L.Q. 15 (1993); Norman B. Smith, "*Shall Make No Law Abridging . . .*": *An Analysis of the Neglected, But Nearly Absolute, Right of Petition*, 54 U. Cin. L. Rev. 1153 (1986).

the media and national political parties took on that mantle, it is now a tool that allows citizens to focus governmental attention on malfeasance, unresolved problems, unpopular policies and popular frustrations without endangering public welfare or order. The petition is the tool that guarantees the public leaders hear the electorate, even if they fail to listen.

The First Amendment of the United States Constitution protects the right of the *people* to petition the Government for a redress of grievances. But when the government is acting as an employer, its interest in achieving its goals as efficiently and effectively as possible is significant. *San Filippo v. Bongiovanni*, 30 F.3d 424, 441 (3d Cir. 1994), *cert. denied*, 513 U.S. 1082 (1995). Although the Third Circuit identified the importance of effective and efficient government, it abruptly departed from the course set by the other Circuits when it granted constitutional protection to governmental employees who articulate their objection, criticism or grievance in writing – a level of protection that is not available to the private sector employee.

This Court should not permit matters of an individual basis – such as disputes between a supervisor and a subordinate in the workplace – to attain constitutional protection simply because the employer is the government. Even though *Connick* did not address the Petition Clause, this Court's mandate is paramount: citizens working for government should not be deprived of their fundamental rights, nor should they receive an immunity for exercising those rights that is not available to the private worker.

The case at bar presents this Court with the opportunity to clarify that in-house grievance procedures should not be granted constitutional protection through the Petition Clause unless such grievance transcends individual complaints and implicates matters of public concern.

Boroughs and other types of municipalities are custodians of the public trust and property, and are charged with providing for the health, safety and welfare of their residents and taxpayers. A premium must be placed upon a goal of efficient and effective operation due to practical financial constraints of the taxing authority. Government as an employer competes with the private sector. It must fulfill its responsibilities, yet provide competitive benefits and wages in order to obtain and retain qualified personnel.

Local government must be able to hire, discipline, discharge and supervise employee conduct. Boroughs do not operate in a vacuum and are subject, *inter alia* to the requirements of labor agreements, which provide negotiated mechanisms to redress employee grievances; state and federal labor laws; Title VII; equal employment opportunity requirements; and the protections from discrimination against protected classes.

Boroughs within the Third Circuit are substantially disadvantaged; they are subject to litigation and the threat of litigation under the Petition Clause that does not exist in the remaining Circuit

Courts. The employer-employee relationship is a constant whether in the public or private sectors. A public employer is still just an employer (without the typical reward of profit), providing wages and benefits in exchange for services. Employees of public employers should not receive greater protections from retaliation, and employees of private employers should not receive fewer protections from retaliation by the employer. Workplace disputes, generally, are not given constitutional protection in the private sector; similarly, workplace disputes should not rise to a constitutional question in the public sector.

Constitutionalizing the personal grievances of employees under the Petition Clause will subject boroughs and other governments to a myriad of federal claims for individual interests solely because the employee formalized and expressed their complaint under the guise of a grievance, arbitration claim or lawsuit. Giving a purely private claim constitutional weight will impair and undermine the local government's ability to render even basic management decisions due to the mere threat of employee claims being brought before the courts. The courts will be faced with the responsibility of overseeing day-to-day managerial decisions affecting policy as well as daily effective and efficient governmental operations.

Smaller governments such as boroughs have limited resources and income. By constitutionalizing individual claims, the threat of the money and time

consumed defending such claims, which foster *in terrorem* settlements, is magnified.

According to the Pennsylvania Governor's Center for Local Government Services, Department of Community and Economic Development, Pennsylvania Local Government Fact Sheet, as of October 2009, 958 boroughs comprise 37% of the 2562 total number of all Pennsylvania municipalities. With a total population of 12,281,054 in Pennsylvania, 78% of all municipalities have a population under 5,000. A total of 159,483 individuals are employed in municipalities of which 19,496 are located in boroughs. Approximately one-third (⅓) of Pennsylvania boroughs as of 2009 have annual budgets of less than $500,000 and at least forty-seven percent (47%) of boroughs have budgets of less than $1,000,000; and, of these: at least ninety (90) borough budgets are less than $100,000; at least 117 have budgets of $100,000 to $250,000; at least 106 have budgets of $250,000 to $500,000; and at least 135 have budgets of $500,000 to $1,000,000.

The threat to efficient and effective management of government operations is real. Elected officials besieged by labor issues subject to federal court actions under the elevated protections of the Petition Clause will also be subjected to the electorate's criticism. A chilling effect on the dedication of elected officials to volunteer for public service will likely ensue. A determined individual or a small number of employees could substantially derail government operations and misdirect public resources to pursue

personal interests, all to the detriment of the public that local government is charged to protect.

The right of petition is "cut from the same cloth" as other guarantees of the First Amendment and was indeed never intended to be elevated to "special first amendment status". *McDonald v. Smith*, 472 U.S. 479, 482, 485 (1985). Using the Petition Clause for access to the courts attracts as much or more divisive attention than employee speech. *San Filippo v. Bongiovanni*, 30 F.3d 424, 450 (3d Cir. 1994), *cert. denied*, 513 U.S. 1082 (1995) (Becker J., concurring in part and dissenting in part). More attention occurs due to downward pressure on taxes, revenue sources, increased time and attention of elected officials to such claims, all rendering government less efficient and effective. Therefore, the public concern espoused in *Connick* should apply to be on par with employee speech. This case provides the time to define the role of the Petition Clause with respect to public employers.

CONCLUSION

Amicus concurs with Petitioner's statement of arguments and authorities cited as well as relief requested as set forth in the Petition for Writ of Certiorari which are incorporated herein.

Respectfully submitted,

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